United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/affidavit of mailing

76-1325

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To be argued by
JONATHAN M. MARKS

P/25

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1325

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWIN ALMESTICA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

BERNARD J. FRIED,
JONATHAN M. MARKS,
Assistant United States Attorneys,
Of Counsel.

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FOR THE SECOND CIRCUIT

Docket No. 76-1325

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWIN ALMESTICA,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant, Edwin Almestica, appeals from a judgment of conviction entered June 21, 1976, in the United States District Court for the Eastern District of New York (Platt, *J.*), upon his plea of guilty, convicting him of bank robbery in violation of Title 18, United States Code, Section 2113(a), and sentencing him to eighteen years imprisonment pursuant to Title 18, United States Code, Section 4205(b)(2).[1]

Appellant's sole claim on appeal is that he was deprived of his right to effective counsel at the time of sentencing. Appellant is presently incarcerated at the Federal Reformatory, Petersburg, Virginia.

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[1] On October 21, 1976, after the filing of this appeal, Judge Platt denied appellant's motion to reduce the sentence made pursuant to Rule 35, Fed. R. Crim. P.

Statement of the Case

Appellant and his half-brother, Isidro Alvarez, were originally charged in a two count indictment (76 Cr. 198) filed March 17, 1976, with the armed robbery on March 3, 1976, of the Chase Manhattan Bank, 1104 Rutland Road, Brooklyn, New York, in violation of 18 U.S.C. § 2113(a) and (d) (A. 3-4).[2]

1. Guilty plea

On April 8, 1976, both appellant and his brother plead guilty to Count One of the indictment charging them with a violation of 18 U.S.C. § 2113(a) in satisfaction of all charges and potential charges arising out of appellant's participation in the armed bank robbery charged in the indictment and an earlier armed bank robbery on October 31, 1976. At the time of the guilty plea, the Assistant United States Attorney placed the agreement between appellant and the Government on the record as follows:

> Mr. Marks: [Assistant U.S. Attorney] Your Honor, the Government has entered into an agreement with Mr. Almestica as well as with Mr. Alvarez. I would like to put both on the record at this time.
>
> The Court: Both of you listen to this.
>
> Mr. Marks: The plea of guilty by Mr. Almestica and Mr. Alvarez to Count 1 of the indictment is accepted in satisfaction of all charges and potential charges arising out of the March 3rd bank robbery and another bank robbery committed on October 31, 1975, at the same bank.

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[2] References are to the Appendix.

> In return for accepting a plea of guilty to Count 1 by Mr. Almestica and Mr. Alvarez, those two defendants have agreed to cooperate fully with the Government and to make a full, immediate and truthful disclosure of all information in their possession concerning other bank robberies of which they have knowledge and in which they participated.
>
> The Government agrees that nothing they say in the course of their cooperation will be used against them in any criminal prosecution; however, the Government has advised the defendants through their attorneys that in the event they make any material [sic] false satements in the course of their cooperation, they are subject to prosecution for perjury.
>
> That's the full extent of the Government's agreement with these two defendants. (A. 12-13).

The district court then engaged in the following colloquy with appellant:

> The Court: You understand that, gentlemen? Specifically, Mr. Almestica, do you understand that?
>
> Defendant Almestica: Yes, sir, I do.
>
> The Court: Is that your understanding as to what agreement you have made with the Government?
>
> Defendant Almestica: Yes, sir.
>
> The Court: What Mr. Kelly [defense's counsel] said and what Mr. Marks said?
>
> Defendant Almestica: Yes, Mr. Kelly explained it to me thoroughly and he explained to me the

deal, the agreement in which me and the District Attorney has made in order for my plea of guilty, accepting my plea of guilty. I understand fully what he expects of us.

Mr. Marks: I might add, your Honor, the Government has agreed to apprise the Court of the full extent of Mr. Almestica's and Mr. Alvarez's cooperation prior to their sentencing. (A. 13-14).

The proceeding concluded as follows:

The Court: It will probably be about six weeks before we get a presentence report at which point you will be brought back.

Mr. Kelly [defense counsel]: Thank you very much.

The Probation Department will come to you because you're the [sic] custody.

Mr. Marks: We will ask [that] sentencing be put off until these men have fully cooperated, which will probably entail testifying at trial.

The Court. It will come up in its normal course. At that point you should make your application.

Mr. Marks: Yes, your Honor.

2. Sentencing

After appellant's counsel advised the district court of appellant's background, which included a high school equivalency diploma and an honorable discharge from the United States Army, he detailed the many problems that appellant had faced which might have contributed to his criminal conduct, including his lack of a struc-

tured home environment, his use of drugs and resulting need for money (A. 28-30). At this point counsel stated:

> "As you know from the probation report, the defendant has cooperated in testifying before the grand jury with respect to the other individuals involved in the robberies in which he was involved. I think however there is some problem at this time with respect to the defendant's continued cooperation."

To this, the Assistant United States Attorney stated that he would like to be heard. Counsel then continued as follows:

> Mr. Kelly: I think the defendant had originally indicated that he would not only cooperate with the government, not only testify before the grand jury, but if necessary he would testify at trial against with respect to whom he testified against in the grand jury. I think the defendant with respect to testifying at trial has now taken a different position and one of the reasons for the sentencing being put on today was in light of that particular situation.
>
> The Court: Is there any reason for his change of heart?
>
> Mr. Kelly: I have discussed it with the defendant, your Honor. I think he unfortunately had some contact with the other individuals implicated in his crimes while he was in jail and after discussing the matter with them, he decided that he was not willing to testify against them. I am not aware that there was any pressure put on him by these other individuals not to testify, but his position at this time is that he just does not want to testify against the other individuals at trial and I think one of the reasons

> this case was put on for sentencing today was to insure the defendant would not have recourse to his Fifth Amendment rights to claim that he couldn't testify because his case had finally not been disposed of.

Appellant's counsel, again, spoke at length concerning appellant's background and concluded as follows:

> I'd ask your Honor therefore to take into consideration the fact that this defendant—young defendant—has not been dealt a very good hand by life, that he has fallen into drug use and has therefore fallen—apparently attributable to his drug use—into some serious crimes. He did plead guilty to the charge and he cooperated to the extent he felt he could and I ask your Honor to take that into consideration in mitigation of sentence. He is a very young man. Unfortunately as with many others, has become precocious and mature in an unfortunate way before his time. I would ask your Honor to be as compassionate towards this defendant as you can. (A. 30-31).

Thereafter, the prosecutor pointed out to the court the "particularly vicious nature of the robbery on March 3rd, 1976," the fact that appellant had carried a loaded weapon during his commission of both robberies, and the fact that appellant had agreed to cooperate before his plea was accepted but had subsequently refused to testify at the trial of his accomplices in the October 31, 1975, bank robbery.[3] (A. 31-33).

Appellant then stated that although he had testified at the Grand Jury, he had never received a contract to

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[3] This robbery was not the subject of the indictment. Rather, it was ~~an earlier~~ a later robbery which was covered by the guilty plea.

sign concerning his testimony, if it were needed, at the trial of Floyd and Olivo, his accomplices in the October 31, 1975 robbery. Appellant stated that he could go no further in his cooperation because of possible adverse consequences to him and his family flowing from his having testified (A. 33-34). Referring to the agreement he had with the Government appellant stated:

> The Defendant: But the agreement wasn't down on any paper, not that I know of. It was just in court when we came before the Honorable Thomas C. Platt. (A. 34).

At this point, appellant's counsel told the court that the agreement was put on the record at the time appellant pleaded and that "unfortunately he has had a change of mind . . . and apparently the government's assurance of protection of himself and his family is not ~~urgent~~ cogent enough to make him take a different position in that regard" (A. 35). The court then sentenced appellant.

ARGUMENT

Appellant's contention that he was deprived of effective representation at sentencing is frivolous.

Appellant's sole contention is that he was deprived of his right to effective counsel by reason of the fact that his attorney stated at the time of sentencing, in answer to a question by the court, that he believed appellant understood the plea agreement which had previously been put on the record but that appellant had a change of heart with respect to his agreement to testify.[4] Neither contention was disputed by appellant at the time, and indeed, as the record shows, it was an accurate statement of appellant's position. Counsel, as did appellant,

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[4] The terms of the agreement were reduced to writing in a letter sent to Almestica's counsel (A. 9).

knew very well what the terms of the agreement were. To now argue that "full cooperation" did not include testimony, in face of the prosecutor's statement at the time of the plea, is disingenuous to say the very least. Moreover, far from being ineffective, counsel's representation at sentence, as the record shows, was complete and thoughtful.

The sentence of eighteen years was within the limitations set forth in the statute (18 U.S.C. § 2113(a)), and, accordingly, is not reviewable on the ground that it was excessive. *United States* v. *Stein*, — F.2d — (2d Cir. October 22, 1976), Slip Op. 211, 221; *United States* v. *Seijo*, — F.2d — (2d Cir. June 24, 1976), Slip Op. 4387, 4398. It is clear that appellant, by this frivolous argument, seeks to avoid the strictures of this rule. Moreover, as the record demonstrates, appellant could hardly have failed to understand that he was expected to testify both before a grand jury and at trial. Therefore, his refusal to testify at the trial of his accomplices was something that defense counsel could not sweep away at sentencing. Indeed, counsel tried to soften the effect of this refusal by providing an explanation for appellant's change of mind—a reason that was clearly relevant for sentencing. Counsel explained the change of mind as prompted by the common experience that a defendant "find[s] a problem in living with himself if he has to testify against those people in open court. He couldn't feel comfortable with himself in testifying . . . ." To now argue that counsel acted improperly in providing this explanation is absurd.

Finally, there is no claim, nor could there be one, that the court relied on erroneous assumptions or incorrect information at the time of sentencing. Nor is there a claim that the district court improperly considered

appellant's failure to testify. If the court did, in fact, consider appellant's failure to cooperate, the sentence cannot be challenged on that ground. Cooperation, or the lack of it, is an appropriate factor for the court to consider in imposing sentence. *United States* v. *Sweig*, 454 F.2d 181 (2d Cir. 1972); *United States* v. *Vermeulen*, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911; *United States* v. *Liddy*, 397 F. Supp. 947, 962 (D.C.D.C. 1975); *and see*, *United States* v. *Stein*, — F.2d — (2d Cir. October 22, 1976), Slip Op. 211, 228 (Lumbard, *C.J.* concurring).

For the foregoing reasons, we submit that this appeal is meritless.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: November 22, 1976
Brooklyn, New York

Respectfully submitted,

DAVID G. TRAGER,
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BERNARD J. FRIED,
JONATHAN M. MARKS,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 26th day of November, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Peter Lushing, Esq.
60 E. 42nd Street
New York, N.Y. 10017

Evelyn Cohen

Sworn to before me this
26th day of November, 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3460350
Qualified in Kings County
Commission Expires 1977